

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JABARI L. MARSHALL,

Defendant.

Case No.: 2:10-cr-236-GMN-PAL

ORDER

Pending before the Court is the Motion to Reconsider, (ECF No. 510), filed by Petitioner Jabari L. Marshall ("Petitioner"). The Government filed a Response, (ECF No. 515),¹ and Petitioner filed a Reply, (ECF No. 516). For the reasons discussed below, Petitioner's Motion to Reconsider is **DENIED**.

I. BACKGROUND

On September 26, 2013, a jury found Petitioner guilty of one count of Conspiracy to Commit Bank Fraud, Mail Fraud, and Wire Fraud in violation of 18 U.S.C. § 1349. (Jury Verdict, ECF No. 358). Petitioner subsequently filed a Notice of Appeal, (ECF No. 465), and the Ninth Circuit affirmed Petitioner's conviction in full. (Mem. Disposition at 4, ECF No. 493).

On March 28, 2016, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 on three grounds: (1) Petitioner did not receive effective assistance of

¹ Petitioner argues that, in considering his Motion for Reconsideration, the Court should strike the Government's Response because the Government did not file it by the original deadline of September 9, 2017; and instead filed it after the Court's *sua sponte* Order extending the response deadline to April 30, 2018. (Reply at 2, ECF No. 516). However, the Court granted that extension to provide a fair opportunity for the parties to brief the issues, and the Government complied with the extended response deadline. Accordingly, for good cause appearing, the Court **DENIES** Petitioner's request to strike the Government's Response.

1 counsel; (2) there was insufficient evidence to convict; and (3) the Government constructively
2 amended the indictment. (Mot. to Vacate, ECF No. 498). The Court denied Petitioner’s Motion
3 to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (“2255 Motion”) on August
4 30, 2017, on all three grounds. (Order, ECF No. 509). On September 25, 2017, Petitioner filed
5 the instant Motion to Reconsider, (ECF No. 510).

6 **II. LEGAL STANDARD**

7 “[A] motion for reconsideration should not be granted, absent highly unusual
8 circumstances.” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted).
9 Reconsideration is appropriate when: (1) the court is presented with newly discovered
10 evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or
11 (3) if there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah Cty. v.*
12 *ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

13 A motion for reconsideration is not a mechanism for rearguing issues presented in the
14 original filings. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985); *see also* D.
15 Nev. LR 59-1(b) (“Motions for reconsideration are disfavored. A movant must not repeat
16 arguments already presented unless (and only to the extent) necessary to explain controlling,
17 intervening law or to argue new facts. A movant who repeats arguments will be subject to
18 appropriate sanctions.”). Further, a motion for reconsideration “may not be used to raise
19 arguments or present evidence for the first time when they could reasonably have been raised
20 earlier in the litigation.” *Carroll*, 342 F.3d at 945.

21 **III. DISCUSSION**

22 Petitioner presents two arguments as to why the Court should reconsider its Order,
23 (ECF No. 509), denying Petitioner’s 2255 Motion. First, Petitioner argues that the Court erred
24 in denying his 2255 Motion because judicial estoppel applied to one of Magistrate Judge
25 Leen’s Reports and Recommendations. (Mot. to Recons. at 2–5, ECF No. 510); (Reply at 2–3,

1 ECF No. 516). Second, Petitioner argues that the Court did not analyze several of the
2 Constitutional guarantees that the Government allegedly violated at his trial, including: (1) the
3 Ex Post Facto Clause; (2) the Fifth Amendment's prohibition on constructive amendments to
4 an indictment; and (3) the Sixth Amendment's requirement that the Government prove every
5 element of a crime. (Mot. to Recons., ECF No. 510 at 4–5); (Reply at 5, ECF No. 516). The
6 Court finds that neither argument warrants reconsideration of the Court's prior Order.

7 Petitioner's first argument contends that Magistrate Judge Leen, in a Report and
8 Recommendation, "adopted as a preliminary matter" one of the Government's positions for the
9 phrase "financial institution" in the Second Superseding Indictment, which affects the statute of
10 limitations for Petitioner's charges; while the Court's later rulings adopted a different position.
11 (Mot. to Recons. at 2–5, ECF No. 510); (Reply at 3, ECF No. 516). According to Petitioner, the
12 Court's denial of his 2255 Motion did not consider how the Court's acceptance of a different
13 position than the one recommended by Magistrate Judge Leen could invoke judicial estoppel
14 principles and affect his conviction. (Mot. to Recons. at 3–4, ECF No. 510); (Reply at 3–4, ECF
15 No 516). The Court agrees with the Government that Petitioner did not make this specific
16 argument in his 2255 Motion, and thus waived it. *See Carroll*, 342 F.3d at 945. *Compare* (Mot.
17 to Vacate at 9, 14–15, ECF No. 498) (arguing judicial estoppel only on the ground that the
18 district court accepted Magistrate Judge Leen's recommendation that a ten-year statute of
19 limitations could apply as argued by the Government, while the Government argued a different
20 position later on); *with* (Mot. to Reconsider at 3–4, ECF No. 510) (arguing that a magistrate
21 judge's report and recommendation warrants judicial estoppel on its own). Even if Petitioner
22 raised this specific argument in his 2255 Motion and it is not waived, this argument fails because
23 the Court is not required to accept a magistrate judge's report and recommendation; and,
24 therefore, the report and recommendation has no effect until the district court takes action. *See*
25 *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir.

2009) (citing 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FED. PRAC. & PROC. CIV. (2d ed. § 3070.1, 2009)) (stating “[i]t is fundamental that [a magistrate judge’s] recommendations do not become an order of the court until the district judge takes some action”); *see also* 28 U.S.C. § 636(b)(1) (explaining how the district court judge “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge”); *see also* D. Nev. Local R. IB 3-2(b). Judicial estoppel thus does not apply as Petitioner argues to an un-adopted, unaccepted portion of Judge Leen’s Report and Recommendation, especially when that Report and Recommendation conflicts with the Court’s later rulings.

Further, to the extent that Petitioner argues the Court was misled by the Government’s positions on the applicable statute of limitations, Petitioner is incorrect. As the Court stated in its Order denying Petitioner’s 2255 Motion, “this Court expressly declined to reach ‘whether the pre- or post-2009 amendment version of 18 U.S.C. § 20 definition of ‘financial institution’ applies in this case.’” (*See* Order 4:4–5:11, ECF No. 509). The Court then followed that finding by stating it “did not rely on or accept the Government’s allegedly inconsistent positions.” (*See id.* 5:10–11). Accordingly, the Court did not misapprehend, misapply, or inconsistently permit different positions by the Government.

Petitioner’s second argument contends that the Government’s Second Superseding Indictment required evidence of mortgage loans obtained from financial institutions as defined by 18 U.S.C. § 20, which could only be accomplished by violating the Ex Post Facto Clause “and other Constitutional guarantees.” (Mot. to Recons. at 4–5, ECF No. 510). Petitioner’s arguments appear to be the same arguments addressed by the Ninth Circuit and improperly raised in the Petitioner’s underlying 2255 Motion. (*See* Order 6:1–15, 7:23–8:2, ECF No. 509); *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000) (“When a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim

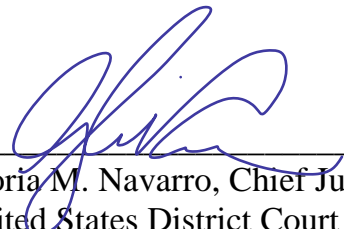
1 may not be used as basis for a subsequent § 2255 petition.”). However, to the extent Petitioner
2 ambiguously intends to raise a new argument, he concedes that this second argument “is
3 predicated on” the Court’s finding that it “misapprehended the facts and positions” discussed
4 above. (Mot. to Recons. at 5, ECF No. 510). Because the Court finds that it did not commit any
5 misapprehensions, Petitioner’s second argument necessarily fails.

6 **IV. CONCLUSION**

7 **IT IS HEREBY ORDERED** that Petitioner’s Motion for Reconsideration, (ECF No.
8 510), is **DENIED**.

9 **DATED** this 6 day of December, 2018.

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Gloria M. Navarro, Chief Judge
United States District Court